Office-Supreme Court, U.S.
FILED
MAY 4 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

DOCKET NO. 1[redacted]237

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of the case	3
Argument	5
Appendix—Opinion of Supreme Court of Tennessee	11

Cases Cited.

Barrett v. State, 190 Tenn. 366, 229 S. W. 2d 516 (1950)	5
Bryant v. United States, 244 F. 2d 411 (5th Cir. 1957)	5
Escobedo v. Illinois, 378 U. S. 478, 12 L. Ed. 2d 977, 84 Sup. Ct. 1758 (1964)	9
Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 31 Sup. Ct. 2 (1910)	5, 6
Johnson v. Commonwealth, 115 Penn. 369, 9 Atl. 78 (1886)	5
Johnson v. State (Texas), 318 S. W. 2d 76 (1958)	5
Lenoir v. State, 197 Md. 495, 80 Atl. 2d 3 (1951)	5
Miranda v. Arizona, 348 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602 (1966)	9
Rochin v. California, 342 U. S. 165, 96 L. Ed. 183, 72 Sup. Ct. 205 (1952)	6
Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932)	5
Schmerber v. California, 384 U. S. 757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 (1966)	6, 7

United States ex rel. Stovall v. Denno, 355 F. 2d 731 (2nd Cir. 1966), cert. granted, 34 U. S. L. Week 3429 (June 20, 1966) 6, 7, 8

Wade v. United States, 358 F. 2d 557 (5th Cir. 1966), cert. granted, 35 U. S. L. Week 3124 (Oct. 10, 1966) 6, 8

Statute Cited.

28 U. S. C., Section 1257 (3) 2

Textbook Cited.

8 Wigmore on Evidence, § 2265, pp. 386, 396 (McNaughton Rev. 1961) 5, 6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

DOCKET NO. 1562 Misc.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for writ of certiorari, respectfully shows to the Court:

OPINIONS BELOW.

The opinion of the Supreme Court of Tennessee upon petitioner's appeal from his conviction in the Criminal Court of Davidson County, Tennessee, is to be found

in the Appendix to respondent's brief. The opinion of the Supreme Court of Tennessee upon petitioner's petition to rehear is also printed in the Appendix to the respondent's brief.

JURISDICTION.

Jurisdiction is sought by the petitioner under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

I.

Whether or not the Fifth Amendment to the United States Constitution relating to self-incrimination prohibits the use of Voice Identification in a state's identification procedure.

II.

Whether or not the Sixth Amendment to the United States Constitution relating to assistance of counsel requires counsel to be present during the **identification procedure,** (1) when the investigation is but a general inquiry into an unsolved crime, and (2) when held prior to the commencement of criminal proceedings.

STATEMENT OF THE CASE.

The record shows that Mrs. Margaret Work Beamer was raped on the night of January 22, 1965. She was assaulted in her home and forced to walk some distance to a wooded area where the rape occurred (B/E, p. 7). Following this incident, she telephoned the police and was taken to a local hospital and examined by Dr. Core, the Medical Examiner for Davidson County, Tennessee. Dr. Core testified that he examined Mrs. Beamer at approximately 10:15 p. m. on the night of January 22, 1965, and that as a result of the examination concluded that she had had intercourse within three (3) hours prior to that time (B/E, p. 88).

The evidence offered on behalf of the defendant consisted primarily of character witnesses with the exception that the defendant testified in his own behalf and said that he was not guilty of raping Mrs. Beamer and, further, that he had never seen her prior to the day on which she identified him as her assailant. The defense in the trial never questioned the fact of rape but took the position that the defendant was not the guilty party. Because of this tactic, it became significant that the State establish that the victim had identified the defendant as the rapist.

The record shows that Mrs. Beamer had made occasional trips to the police station to identify suspects in the interim period between January 22, 1965, and August 17, 1965 (B/E, p. 28). The record also shows that Mrs. Beamer identified the defendant prior to the front page article which published a picture of the petitioner. She identified him on the afternoon of August 17, 1965, and stated that it was the next morning when the picture of the petitioner was published in the local papers (B/E, p. 27). She identified the petitioner as the rapist (B/E,

p. 14a), and based that identification on his size, voice, skin texture, and hair (B/E, p. 17 ff). Mrs. Beamer, a Negro, stated during the trial that there was absolutely no doubt in her mind but that the petitioner, a Negro, was the person who had raped her (B/E, p. 19). She stated that she was able to look "up in his face" on the night she was raped (B/E, p. 42). She said, in response to a question put to her on cross-examination concerning whether or not she could see the rapist, "Yes, I could see him, when I looked up in his face."

Mr. Thomas E. Cathey, an officer with the Homicide Division of the Nashville-Metropolitan Police Department, testified that the petitioner was arrested at about 1:30 a. m. on August 17, 1965. He was taken immediately to the Juvenile Court, his mother came and in her presence the defendant was advised of his constitutional rights. He was then questioned concerning the incident which had occurred earlier that night which was the incident for which he was arrested (B/E, p. 71). He was accused of having attempted to rape a woman in the Nashville area.

While in the custody of the police, the petitioner was identified by Mrs. Beamer. At that identification, he was asked to repeat the words used by the rapist on January 22, 1965. The record shows that the police called Mrs. Beamer to headquarters as they had done in the past, although the petitioner was not arrested for raping her nor had any investigation focused upon him.

ARGUMENT.

I.

The overwhelming majority of jurisdictions permit testimony concerning Voice Identification to be admitted against the defendant. When an accused is required to speak certain words solely for the purpose of identification of his voice, there is no violation of the Fifth Amendment privilege. This general statement is supported both by the authorities and by case law. 8 **Wigmore on Evidence**, § 2265, pp. 386, 396 (McNaughton, Rev. 1961); **Lenoir v. State**, 197 Md. 495, 80 Atl. 2d 3 (1951); **Johnson v. Commonwealth**, 115 Penn. 369, 9 Atl. 78 (1886); **Johnson v. State** (Texas), 318 S. W. 2d 76 (1958).

A number of circumstances involving the identification of an accused have been held not to violate the Fifth Amendment privilege against self-incrimination. In the case of **Barrett v. State**, 190 Tenn. 366, 229 S. W. 2d 516 (1950), the defendant was required to wear a hat during the identification procedure. In the case of **Ross v. State**, 204 Ind. 281, 182 N. E. 865 (1932), the accused was required to grow a beard and place a handkerchief across his face. In **Bryant v. United States**, 244 F. 2d 411 (5th Cir. 1957), the accused was required to furnish the police with a handwriting specimen. In the case of **Holt v. United States**, 218 U. S. 245, 54 L. Ed. 1021, 31 Sup. Ct. 2 (1910), the accused was required to wear a shirt or blouse.

The petitioner has cited two (2) cases in which this Court has granted certiorari. Although there appears to be a conflict in the conclusions reached by the two circuits, neither court concluded that it would be a violation of the Fifth Amendment to allow a victim to identify

an accused. See: **United States ex rel. Stovall v. Denno**, 355 F. 2d 731 (2nd Cir. 1966), cert. granted, 34 U. S. L. Week 3429 (June 20, 1966); **Wade v. United States**, 358 F. 2d 557 (5th Cir. 1966), cert. granted, 35 U. S. L. Week 3124 (Oct. 10, 1966).

In the case of **Rochin v. California**, 342 U. S. 165, 96 L. Ed. 183, 72 Sup. Ct. 205 (1952), the accused swallowed two (2) morphine tablets at the time of his arrest. He was taken to a physician who pumped his stomach and the pills were seized and analyzed. Mr. Justice Douglas, in speaking with the majority but in a concurring opinion, said, regarding the privilege against self-incrimination, that: ". . . I think that **words taken from his lips**, capsules taken from his stomach", etc., are inadmissible if without the accused's consent (Emphasis supplied). This rationale is in keeping with this Court's statement in **Holt v. United States**, *supra*. It is the forced **communication** of some fact from the accused to the authorities which is prohibited by the Fifth Amendment. The mere muscularization of the vocal cords for the purpose of identification is different from eliciting from the accused his awareness of facts concerning the crime. An often used quote taken from **Wigmore on Evidence**, *supra*, § 2265, is as follows:

> "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, demand made upon him is not a testimonial one."

(And, therefore, not protected by the privilege.)

Although this Court has not completely accepted the theory of Professor Wigmore that the privilege protected by the Fifth Amendment is limited to testimonial disclosures, the case of **Schmerber v. California**, 384 U. S.

757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 (1966), does represent the view that the Fifth Amendment privilege does not prohibit the taking of a blood test over the objection of the defendant. There, this Court said:

> "We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, in that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

The same reasoning is applicable in the case of Voice Indentification. This Court acknowledged in the **Schmerber** case that both federal and state courts have usually held that the Fifth Amendment privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

Under the facts in the case at bar, the requirement that the petitioner speak for the purpose of identification did not have the effect of eliciting from him any factual information regarding the crime which he possessed. This is the test which has traditionally been applied. The petitioner was not asked for any factual information whatsoever. He was not asked to recite of his own knowledge what was said at the time Mrs. Beamer was raped. He was merely requested to repeat the words which the rapist used on the night of the crime.

As was said in the case of **United States ex rel. Stovall v. Denno**, *supra*, there is no prejudice in these situations

where the victim later positively identifies the accused in the trial. As has heretofore been stated, Mrs. Beamer made a positive identification of the petitioner at the trial (B/E, p. 19). As was further stated in the **Stovall** case, the method of identification of the petitioner should go not to the admissibility or sufficiency of the identification, but to the weight to be given the testimony concerning it. The Court said in the case of **Wade v. United States**, *supra*, that an identification procedure properly conducted does not run afoul of the self-incrimination provision of the Fifth Amendment.

II.

Petitioner urges this Court to grant certiorari in this case because he contends that the identical question raised here is presented in the two (2) cases mentioned in which this Court has previously granted certiorari. Respondent respectfully insists that the questions are not the same.

It is clear from an analysis of **United States ex rel. Stovall v. Denno**, *supra*, and **Wade v. United States**, *supra*, that the question in those cases is not whether it is a violation of due process for a victim to identify an accused during an identification procedure at police headquarters; but whether it is incumbent upon the State to provide counsel to the accused at the identification procedure following the commencement of criminal proceedings against him. The case at bar is unlike those cases inasmuch as at the time of the identification of the accused by Mrs. Beamer, no criminal proceedings had commenced insofar as this matter is concerned. The plain truth is that the petitioner had been arrested on a separate charge and as a matter of general inquiry Mrs. Beamer was called to see whether or not she could identify him.

This is not a situation in which an investigation had focused upon an accused held in police headquarters and

is, therefore, not within the realm of **Escobedo v. Illinois**, 378 U. S. 478, 12 L. Ed. 2d 977, 84 Sup. Ct. 1758 (1964), or **Miranda v. Arizona**, 348 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602 (1966)

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee.

Certificate of Service.

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of April, 1967, I served a copy of the within brief in opposition to the petition for writ of certiorari on Archie Nathaniel Biggers, petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to counsel of record, namely, Michael Meltsner, Esq., Attorney at Law, 10 Columbus Circle, New York, New York.

George F. McCanless,
Attorney General,
State of Tennessee.